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Federal Communications Commission
Office of the Secretary

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	MM Docket No. 91-221
Review of the Policy Implications	)	
of the Changing Video Marketplace	)	

COMMENTS OF THE
NATIONAL ASSOCIATION OF BROADCASTERS

Respectfully submitted,

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EXECUTIVE SUMMARY

NAB supports the Commission's reexamination of the video marketplace and the role which regulation has played in encouraging changes in it, changes which may now endanger the future of over-the-air television. Many of the Commission's policies have rested on an assumption that the public interest would be served by incentives to create an ever-greater number of competitors for existing television stations. Those policies have succeeded too well, and rules which restrict broadcasters, while leaving their competitors unfettered, or which require broadcasters to subsidize the development of competing technologies should now be discarded.

In particular, the Commission should support changes in the broadcast-cable relationship. Communications and copyright policy for 30 years has fostered growth of cable systems and cable services at a rate which was inconceivable only a few years ago. Cable's dominant regulatory position created incentives for the development of new cable services which now compete with over-the-air broadcasters for programming, advertisers, and viewers.

The most watched channels on cable television systems, and the services which generate the most value for cable operators, are the signals of broadcast television stations. Cable obtains these benefits without any cost or obligation to the broadcasters which provide them, while using the resulting revenue to create cable services to compete with broadcasters, even though those services' audiences are rarely large enough to survive on their own.

If a system of over-the-air television stations is to survive, this subsidy must end, and broadcasters granted the right to recognize the value which they create for cable operators. NAB urges the Commission to support pending legislation which will end cable's unique exemption from the retransmission consent requirement of § 325 of the Communications Act and give broadcasters the option of getting secure carriage and channel positioning rights on local cable systems.

The suggestion of some that repeal of the cable compulsory license would be an effective alternative to retransmission consent is incorrect. A copyright regime might benefit programmers, but it would leave broadcasters without control over their signals. Broadcasters may be bypassed in negotiations between program suppliers and cable systems. Even if broadcasters had the right to control cable retransmission of the programs they aired, program suppliers could and would ensure that any negotiations would only involve money payments which could flow through to the programmer, rather than the varied options which a broadcaster could seek from a cable system in lieu of cash if the negotiations were based on retransmission consent. Repeal of the compulsory license would also jeopardize the establishment of new must carry rules, a fundamental first step in restoring balance to the video market.

A further action which the Commission can take to change outmoded rules which unduly restrict broadcasters is elimination of the national ownership limits for television stations. As the Commission has recognized, questions of diversity are only relevant in terms of the programs available to a local viewer. National ownership limits have no impact on local diversity.

The explosion in the number of video sources eliminates the possibility of undue economic influence being exercised by any one broadcast owner even in the absence of limits on station ownership. The number of over-the-air video outlets has continued to grow since the Commission last reviewed the multiple ownership rules in 1984, and cable outlets and cable networks have proliferated. The steady division in the video market has reduced the chance of any broadcaster achieving a position of dominance. A Herfindahl-Hirschman Index of the broadcast television market shows that it is highly unconcentrated, and, in the top 25 television markets, the leading stations are owned by 17 different groups.

While the Commission has recognized the economies of scale which group ownership can provide, it continues to restrict broadcasters' ability to achieve those economies, while placing no restrictions whatever on cable or other competing video providers. There can be no justification for continuing this anomalous treatment of broadcasters.

Similarly, while it is appropriate to continue exercising controls over ownership concentration at a local level, the Commission should consider changes in its duopoly and cross-ownership rules to reflect current market realities. While broadcasters' interests in other outlets in their markets are strictly limited, cable operators can control unlimited channels. As OPP recommended, the Commission should consider reducing the prohibited overlap between television stations to Grade A contours and to permit common ownership of some UHF stations. Alternatively, the Commission should liberalize the possibilities of waiving the duopoly and cross-ownership rules where local diversity will not be substantially diminished by a proposed transaction.

At the same time, however, the Commission should be sensitive to maintaining regulations which prevent even greater dislocation in local video markets by cable systems. In order to prevent even further deterioration in broadcasters' ability to provide independent, diverse sources of information and entertainment, the Commission should retain its broadcast/cable and network/cable cross-ownership rules which maintain television stations' independence.

Common ownership between a broadcast network and a cable MSO would create new incentives for discrimination against local broadcasters. Rather than a free market in which cable operators and broadcasters can compete for viewers and programming, carriage and programming decisions could be manipulated by the network-MSO combination to promote its long-term interests at the expense of competitors and the public. Permitting joint ownership of networks and cable systems would also threaten the network/affiliate relationship which has been a cornerstone of television service. Combined ownership of a local station and a cable system would also create incentives for discrimination against competing broadcasters which would harm the marketplace and hasten the creation of a video market wholly controlled by monopoly cable operators.

These reasons also counsel for continued prohibitions on control over content by telephone companies providing video services. While the prospect of competition for cable systems is desirable, the crucial mistake in establishing cable policy was the combination of carriage and programming interests in one entity. If that inherently anticompetitive situation is extended to telcos which have almost unlimited resources, the certain result is the elimination of any independent sources of programming and the abandonment of the Commission's longstanding goal of promoting diversity.

Recognizing the overwhelming change in the television market, the Commission should abandon its archaic rule barring broadcast networks from providing multiple services. The rule dates from an era when there were only two national networks, conditions far removed from today's market. Cable network providers are subject to no similar limitation, and continuing the rule only creates disincentives for the creation of new broadcast services, further enhancing cable's competitive position. Elimination of the dual network rule would stimulate development of new programming and possibly new technologies such as signal compression.

Finally, in considering changes in video technology, the Commission should take steps to ensure that broadcasters are able to utilize advancements in signal compression. If broadcasters can become multichannel providers, that offers the best prospect of a viable competitive alternative to cable systems. Broadcasters could then also take advantage of multiple revenue streams and use their skills to offer specialized programming to the public. As the Commission examines changes in the video market, it should make sure that technical standards it adopts are fully consistent with broadcasters' historic place as the center of the Commission's policy of ensuring the availability of diverse sources of programming to the American people.

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COMMENTS OF THE
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The National Association of Broadcasters ("NAB")[1/] applauds the Commission's initiative in commencing this proceeding[2/] seeking comments on changes in the state of the video marketplace and the public policy implications flowing from these changes. NAB heartily concurs with the Commission's expressed "concern that some of [its] television rules and policies may no longer be in step with current industry circumstances"[3/] and welcomes the opportunity to provide the following insights and recommendations.[4/]

1/ NAB is a nonprofit, incorporated association of radio and television broadcast stations and networks. NAB serves and represents America's radio and television stations and all the major networks.

2/ Notice of Inquiry in MM Dkt. No. 91-221, 56 F.R. 40847 (August 16, 1991) ("Notice").

3/ Notice ¶ 1.

4/ In comments filed in MM Dkt. No. 90-4 on September 25 and October 25, 1991, NAB argued that the single most significant action the Commission can take to help restore some balance to the video marketplace would be the rapid reestablishment of rules requiring cable systems to afford secure carriage and channel positioning rights to local broadcasters. We respectfully refer the Commission to those

(continued...)

I. INTRODUCTION

For more than 50 years, the Commission's mass media decisions have been driven by a core belief that the creation of more competing outlets is an unalloyed public good. The Commission has encouraged the development of more over-the-air broadcast networks, independent television stations, cable television, cable networks, MMDS systems, and direct broadcast satellites. The assumption — spoken or unspoken — behind all of these decisions has been that additional media outlets can be created without any loss to the public of the benefits they already receive from existing stations and networks. For a long time, that assumption was not unjustified. It is now manifestly clear, however, that the period of unlimited expansion without public cost is over. The change to a multi-channel programming environment brought about by the growth of cable systems and cable networks threatens the future viability of over-the-air television stations and broadcast networks.

Contrary to suggestions in the Notice (¶¶ 6-7), this threat is not only the result of new technologies, but is caused by regulatory choices made by the Commission and the Congress to enhance the development of competitors to existing broadcasters, while at the same time continuing to hobble broadcasters with many

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4/ (...continued)
comments and urge that creation of must carry rules be the Commission's first priority in addressing the new video environment.

outmoded shackles that were imposed when they, in essence, were the home video marketplace. These regulatory choices, however, have succeeded too well. The establishment of a cable environment capable of delivering multiple channels to virtually every television home[5/] was made possible by regulatory choices under which existing broadcasters subsidized the creation of their competitors. The resulting economic imbalance now creates incentives for programming and viewers to move from universal, free, over-the-air service to cable services which would not otherwise be able to survive. If the Communications Act's goal of fostering universal free service is to survive, the regulatory imbalance in the video marketplace must be corrected.

II. THE BROADCAST/CABLE RELATIONSHIP

A. The History and Present Status of the Relationship -- How it Became Unbalanced

Cable systems for a long time had the single purpose of improving reception for broadcast signals. Indeed, cable systems carrying radio signals were in operation as early as 1923.[6/] These early cable systems were for the most part

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5/ Cable systems now pass more than 93 percent of all television homes. The Kagan Media Index, Oct. 22, 1990, at 2. This rapid a spread of cable technology was inconceivable only a few years ago. See Home Box Office, Inc. v. FCC, 567 F.2d 9, 24 (D.C. Cir. 1977)("[E]xtension of cable service with cablecasting ability to the country as a whole does not seem possible in the immediate future").

6/ E. BARNOUW, TUBE OF PLENTY 352 (1975).

unregulated.[7/] As cable systems began to grow, several different approaches to regulation were propounded to the Commission. It first concluded that cable systems were not subject to regulation as common carriers under Title II of the Communications Act. Frontier Broadcasting Co. v. Collier, 16 RR 1005 (1958). Had cable systems been treated as common carriers, of course, the problems which now exist from the dual role of cable operators as carriers and programmers would never have arisen, as cable channels would be equally accessible to any program supplier.

In CATV and TV Repeater Services, 26 FCC 403, 429-30 (1959), the Commission further concluded that cable systems were not required to obtain consent before retransmitting a broadcast signal, thus granting cable a unique exception to the requirement of obtaining retransmission consent applicable to every other commercial user of a broadcast signal. Recognizing this anomaly, the Commission referred the question of cable systems' use of broadcast signals to Congress. Id. at 430. It reiterated its request for Congressional guidance in Microwave-Served CATV, 38 FCC 683, 704 (1965). No legislation resulted from these requests, perhaps due to the difficulty of reaching an accommodation between competing interests of cable operators, broadcasters, and program suppliers, and the

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7/ It is far from clear that this regulatory vacuum was intentional. In the debates leading to passage of the Radio Act of 1927, the bill's manager, Senator Dill, specifically alluded to use of broadcast signals by the "wired wireless"— an apparent reference to these early cable systems— as subject to the retransmission consent provision of the Act. That provision that was carried over without change into § 325 of the Communications Act. 68 Cong. Rec. 2880 (1926), reprinted in, Amendment of Rebroadcasting Rules, 1 RR 91:1131, 1133-34, recon., 1 RR 91:1136 (1952).

conflicting jurisdiction of the Congressional committees responsible for communications and copyright policies.

Cable systems' ability to use broadcast signals and programming was further enhanced by court determinations that there was no copyright protection for cable retransmission of programs carried on broadcast signals, whether retransmitted in local or distant markets. Teleprompter Corp. v. CBS, Inc., 415 U.S. 394 (1974); Fortnightly Corp. v. United Artists Television, Inc., 392 U.S. 390 (1968). While in the 1976 Copyright Act, Congress established some protection for program suppliers from cable use of distant broadcast signals by requiring the payment of a statutory copyright fee, cable operators retained a compulsory license for the programs on any signal which the FCC permitted them to carry and the right to retransmission of programs on local signals without any copyright payment.

Recognizing the threat to the system of over-the-air broadcasting that unregulated growth of cable television could cause, the Commission created a number of rules designed to prevent abuse by cable systems of their ability to bypass local stations. These rules included restrictions on cable program siphoning, distant signal importation, and must carry regulations. One by one, however, these efforts to create a balance between broadcasting and cable were discarded.[8/]

8/ See Quincy Cable TV, Inc. v. FCC, 768 F.2d 1434 (D.C. Cir. 1985), cert. denied, 476 U.S. 1169 (1986)(must carry rules); Home Box Office, Inc. v. FCC, 567 F.2d 9 (D.C. Cir. 1977)(program siphoning restrictions); CATV Syndicated Exclusivity Rules, 79 FCC 2d 663 (1980), aff'd sub nom. Malrite T.V. v. FCC, 652 F.2d 1140 (2d Cir. 1981), cert. denied, 454 U.S. 1143 (1982)(distant signal rules).

The result was a dominant position for cable television, a position reinforced by the 1984 Cable Act which restricted local control over cable systems and virtually ended regulation of cable rates. Cable systems are able to take broadcast signals, local or distant, and market them to subscribers. With the exception of a distant signal fee, cable systems incur no cost or obligation from the use of broadcast signals.[9/] Cable systems also accept no obligations to broadcasters in exchange for these benefits. Broadcast signals may now be dropped or repositioned at a cable operator's whim.

Yet the signals of over-the-air television stations consistently are the most watched channels on any cable system. In 1989-90, 61 percent of viewing in cable households was of over-the-air broadcast stations.[10/] Every survey of cable subscribers shows that broadcast signals are the channels on their cable system on which they place the highest value. In a recent Roper poll of cable subscribers, 43 percent of the respondents indicated that they would cancel their cable subscription if the signals of the three established networks were not carried and up to two thirds of subscribers would consider cancellation.[11/] A cable operator similarly estimated

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9/ The monies paid for distant signals do not generally flow to broadcasters, but instead to program suppliers. Only approximately five percent of the distant signal fund is now paid to broadcasters for the programming they originate. Broadcasting, Nov. 18, 1991, at 5.

10/ Setzer & Levy, Broadcast Television in a Multichannel Marketplace (FCC Office of Plans & Policy 1991)[hereinafter the OPP Report] 23. The OPP Report classified WTBS-TV as a basic cable service, rather than a superstation, so the figure for total viewing of over-the-air stations is less than the actual level.

11/ The Roper Organization, America's Watching: Public Attitudes Towards Television 1991 8.

that roughly 70 percent of basic-only subscribers would cancel their subscriptions if cable systems no longer carried broadcast signals.[12/]

There can be no doubt that the audiences created for cable systems by over-the-air television stations are the bedrock of the cable industry. Without access to this huge audience, it would have been impossible to create the myriad cable programming networks which now exist and which compete with broadcasters for programming.[13/] Yet, with the exception of NFL football carried on cable networks, the most popular cable network has fewer viewers than the least popular over-the-air broadcast station. In November 1990 in the Colorado Springs-Pueblo market, independent station KXRM-TV received a sign-on/sign-off rating of 2, compared to 1 ratings for ESPN and USA Network, the most popular cable channels in the market. In prime time, the broadcast station achieved a 4 rating, while the cable networks had 2 and 1 ratings, respectively.[14/]

Cable systems therefore get the programming that their subscribers most watch and desire at virtually no cost and with no regulatory conditions. The cable programming that subscribers watch little of, by contrast, cable operators pay

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12/ Marc Nathanson, President of Falcon Cable Television, quoted in CableVision, Jan. 30, 1989, at 34.

13/ NTIA concluded in a study of the cable industry: "As more areas became cabled, a critical mass of homes developed nationwide, creating sufficient potential revenues to inspire cable networks to emerge. . .." Video Program Distribution and Cable Television: Current Policy Issues and Recommendations, NTIA Report 88-233 at 9 (1988).

14/ Nielsen Station Index/Viewers in Profile, Colorado Springs-Pueblo, November 1990, Daypart Summary at 8, 10.

dearly for. In 1989, CNN and ESPN received ratings of .7 and .9 nationally.[15/] Cable systems paid these little-watched networks $191 million and $207 million, respectively.[16/] Recognizing this discrepancy, studies of cable conclude that broadcast channels are the primary contributors to cable revenues. A study commissioned by the cable industry concluded that carriage of local stations accounted monthly for between three and five dollars per subscriber of a cable system's operating revenue.[17/] The value brought to the cable system from the carriage of distant broadcast signals would add to this figure. A Paul Kagan channel valuation model confirms the primary value to cable operators of broadcast signals. The Kagan study concluded that carriage of the three established networks' signals alone contributed an estimated $7.13 per subscriber out of a total estimated monthly per subscriber revenue of $16.93. Net revenue attributable to carriage of all local signals was 56 percent of the cable system's total.[18/]

One observer of the cable industry commented:

> "In our view it is fair to say that the networks account for much of the value of cable service for which subscribers now pay $13 billion annually. It is clear cable operators and cable originated program services are essentially

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15/ Channels, Nov. 1989, at 96.

16/ "New Fees Alter 'Basic' Idea of Cable TV," Wall Street Journal, Jan. 23, 1990 at B-1.

17/ CableVision, Jan. 30, 1989, at 34.

18/ Paul Kagan Associates, Inc., Marketing New Media, Jan. 15, 1990, at 3.

> subsidized by the broadcast networks and television stations."[19]

Broadcast signals, therefore, have and continue to provide the financial engine that fuels cable expansion. Sale to subscribers of broadcast signals which cable systems obtain for nothing represents the majority of cable system subscriber revenues. The revenue stream generated from carriage of broadcast signals has been used by cable systems to support the creation of program services which could not survive based on their own viewership. As these cable program services develop, cable networks are increasingly able to bid against over-the-air broadcast stations for programming that once was carried by broadcasters. Because cable systems are not subject to any pricing restraints from regulation or competition, any increase in program costs can be passed on to consumers.

If programming continues to migrate to cable networks, their ratings will rise. Already, cable systems are aggressively selling advertising in competition with local broadcasters. Advertising sales by cable systems, cable networks, and cable regional sports channels in 1990 totalled $2,547 million annually. This represents an increase of 113 percent since 1987.[20] If advertising revenues are diverted from broadcast stations — which are entirely dependent on advertising for their revenues — to cable, the result will be a further undermining of the economic foundations of over-the-air broadcasting.

19/ Merrill Lynch Capital Markets, The Year Ahead: Broadcasting 43 (Dec. 13, 1988).

20/ The Kagan Media Index, Oct. 21, 1991, at 12.

It cannot be seriously maintained that loss of the existing broadcasting system will not harm the public interest. It is most obvious that the almost 40 percent of television households which cannot or do not subscribe to cable television will be deprived of the service on which they depend for news and entertainment. Even for cable households, the choice of the programming available to them will devolve on one cable operator, demolishing at a stroke the Commission's core policy of promoting the availability of information from diverse voices. Moreover, even a brief comparison of the programs provided by over-the-air broadcasters and cable networks demonstrates the loss that the public would suffer. Just in prime time alone, the four broadcast networks provide hour after hour of original programming every week. While cable networks have begun to produce some original programs, the number of such programs is small and the number of original episodes produced each year is frequently only a fraction of the number produced for the broadcast networks. The majority of the programming carried on cable networks is obtained from another program source. If cable becomes the dominant supplier of television programming, the quality of video programming will inevitably decline.

The key factor in this development is the ability of cable systems to take broadcast signals without payment, negotiation, or conditions. Cable systems can take full advantage of the audiences attracted by strong broadcast stations, and manipulate or drop the carriage of weaker stations in order to enhance the cable system's competitive advantage in selling advertising.[21/] If there was at one time

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21/ See, e.g., Comments of NAB, MM Dkt. No. 90-4 (filed Sept. 25, 1991), at 18-31.

some public interest justification for requiring broadcasters to subsidize the development of cable systems, that time is surely long past. Broadcasters should be able to recognize the value which they bring to cable systems. With the end of the subsidy of cable operators and programmers, broadcasters will be able to continue to provide the most attractive programming to a wide audience.

B. The Most Significant Steps That Can Be Taken to Restore a Competitive Balance in the Video Marketplace are Adoption of Must Carry and Retransmission Consent

Two bills now pending before Congress would help to eliminate the current imbalance between broadcasting and cable. NAB urges the Commission to support enactment of these or similar bills to ensure a viable video marketplace. S. 12 and H.R. 3380 would both amend section 325 of the Communications Act to put cable retransmission of broadcast signals on the same footing as other uses of broadcast signals. With certain exceptions,[22] cable systems and other multi-channel video distributors (such as MMDS systems) will need to obtain consent from an originating broadcaster before they can retransmit that broadcaster's signal. Section 325 recognizes the value inherent in a broadcaster's signal. In Frontier Broadcasting Co. v. FCC, 412 F.2d 162 (D.C. Cir. 1969), the court held that "Congress has, by law, expressed its intention to provide certain protections to

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22/ Recognizing that certain viewing patterns have become established, H.R. 3380 would exempt from the requirement of retransmission consent carriage by satellite of the signals of non-network stations to home satellite dishes, transmission of network stations to home satellite dishes in areas unserved by a network affiliate, and transmission by satellite of the signals of superstations to cable systems and other multi-channel video distributors.

originating stations with regard to the programs they choose to put on the air." Id. at 164. The court continued: "Section 325(a) . . . is an effort by Congress to recognize the right of the originating station to control its programs once they have left the tower." Id. at 165. S. 12 and H.R. 3380 will eliminate the exception to section 325 for the cable industry, an exception which has permitted uncontrolled use of broadcasters' only product by their primary competitors.

S. 12 and H.R. 3380 create a right for broadcasters. The ability to grant retransmission consent does not inhere in a program supplier or a network, but only in the station whose signal would be retransmitted. Retransmission consent thus directly addresses the role of the broadcaster in the developing multichannel environment. Amendment of section 325 to permit broadcasters to control the use of their signals will permit them to continue to be effective program distributors and originators, and to provide the diverse sources of news and information that the Commission intended when it established the present system of television allocation.

Rather than simply taking a broadcast signal, cable systems would be required to negotiate for broadcasters' consent. Neither bill sets any constraints on these negotiations. No price or terms are established in the bill, and the Commission would not be required to participate in negotiations or even be aware of the terms agreed on by a cable system and a television station. Amendment of section 325 thus would create a market mechanism for recognition of the value which carriage of broadcast signals brings to cable systems. While the negotiations might well result in monetary payments, other forms of compensation such as the right to program an additional channel on a cable system, participation in a joint news programming venture, or enhanced channel positioning might also be the result of negotiations between broadcasters and cable operators. Any of these could improve broadcasters' competitive position and result in greater service to the public.

Recognizing that, for some broadcasters, assured carriage on a cable system would be adequate compensation for the benefits which the broadcaster brings to a cable system, S. 12 and H.R. 3380 also provide for signal carriage and channel positioning rights as an option for broadcasters. Each television station periodically would elect whether to negotiate with a cable system for carriage or to assert its must carry rights, in which case the cable system would not have to obtain further consent from the broadcaster for retransmission. Retention of must carry provisions as an option for broadcasters ensures that cable systems will not be able to engage in anticompetitive behavior with respect to carriage, particularly of weaker independent stations with which cable operators may be competing for viewers and advertising.

C. **Repeal of the Cable Compulsory License Would Be Antithetical to the Goal of Restoring a Balance in the Video Marketplace**

The Commission asked for comments on whether repeal of the cable compulsory copyright license would be effective in assuring broadcasters' competitive position in a multichannel environment. Notice of Inquiry ¶ 9. As an initial matter, enactment of the retransmission consent provisions of S. 12 and H.R.

3380 would not conflict with the continued operation of the cable compulsory license. As the Senate Commerce Committee noted in reporting S. 12:

> "The principles that underlie the compulsory copyright license of section 111 of the copyright law (18 U.S.C. 111) are undisturbed by this legislation .... The Committee emphasizes that nothing in this bill is intended to abrogate or alter existing program licensing agreements between broadcasters and program suppliers, or to limit the terms of existing or future licensing agreements."[23/]

By its terms, the compulsory license applies to cable retransmission of primary transmissions by broadcast stations "where the carriage of the signals comprising the secondary transmission is permissible under the rules, regulations, or authorizations of the Federal Communications Commission." 17 U.S.C. § 111(c)(1). Thus, it is not the retransmission of the programs on any broadcast signal that is subject to the compulsory license, but only those retransmissions which are consistent with FCC rules. Those rules may vary — as indeed they have done since 1976 — without any change in the compulsory license.

Cable systems are granted a copyright license for programs carried on signals which, pursuant to communications policy, they may retransmit. The House Judiciary Committee report on the compulsory license explicitly cautioned against any argument that the creation of the compulsory license was intended to set or limit communications policy:

> "Specifically, we would urge the Federal Communications Commission to understand that it was

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23/ S. REP. NO. 102, 102d Cong., 1st Sess. 36 (1991).

> not the intent of this bill to touch on issues such as pay cable regulation or increased use of imported distant signals. These matters are ones of communications policy and should be left to the appropriate committees in Congress for resolution."[24/]

The apparent assumption behind suggestions for repeal of the compulsory license is that local broadcasters would obtain the rights to license retransmission from networks and program suppliers, and would thus be placed in a position to negotiate with cable systems in the same way that an amended retransmission consent provision would make possible. The compulsory license, however, deals with the copyright interests in the programs on broadcast signals; retransmission consent deals instead with the interest of broadcasters in their own signals. After passage of the 1976 Act, broadcasters sought to have a value in their signal recognized under copyright principles separately from the interests of program rights holders. The CRT rejected this compilation interest as a significant copyright interest. NAB v. Copyright Royalty Tribunal, 675 F.2d 367, 378-79 (D.C. Cir. 1982). It is thus important that broadcasters' interest in their signals be recognized as a matter of communications law.

Repeal of the compulsory license would not achieve the same objective as retransmission consent. It would give more rights to copyright holders and program producers, but broadcasters would still be left without the authority to control their own signals. Broadcasters, at most, would only be agents for program suppliers in negotiations with cable systems; the rights being negotiated would not be

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24/ H.R. REP. NO. 1476, 94th Cong., 2d Sess. 89 (1976).

the broadcaster's. Some copyright owners might choose to bypass broadcasters and negotiate copyright fees directly with cable systems. Other programmers might place onerous restrictions on broadcasters' authority to permit cable retransmission, effectively limiting broadcasters' ability to negotiate with cable systems.

Unlike a retransmission consent regime, negotiations for a copyright retransmission license would only concern money. The program suppliers on whose behalf the broadcaster would be acting would have no interest in additional channel positions or other enhancements for the broadcaster's position. Their only interest would be in additional revenue. Repeal of the compulsory license, therefore, would be far more restrictive in terms of options for broadcasters than would amendment of section 325.

That broadcasters' role in such an environment would be only that of a "middleman" was confirmed in a recent interview with Trygve Myhren, formerly Chairman of ATC and now President of the Providence Journal Company. Myhren commented that, rather than negotiating with broadcasters for distant signals,

> "the negotiation on them will be between the programmer or the studio and the cable operator. For example, WGN buys the program for Chicago. If I'm a cable operator in Minneapolis and WGN comes in there and I want that program, I will go and work with the programmer, not with WGN."[25]

For local signals, Myhren predicted that, if the compulsory license were repealed,

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25/ "Trygve Myhren: Finding Communication's Common Ground," Broadcasting, Nov. 18, 1991, at 47.

> "What we're talking about here is a situation where the broadcaster basically gets squeezed out between the cable operator and the programm[er]. The broadcaster loses his function and the consumer loses the choice of over-the-air television.
>
> "Hollywood and syndicators, in selling these programs, don't really have to sell to the local station the right to resell. They only have to sell that right to the broadcast station if the broadcast station will pay them a lot of money. So in the end the broadcast station is not going to get that right unless it is willing to pay . . . as much money . . . as the programmer or studio would have gotten had it sold this right to the broadcaster and then sold the retransmission right directly to the cable operator. <u>What's happening is that the studios are gaining money</u>."[26/]

Thus, repeal of the compulsory license cannot be viewed as a viable method of improving the video marketplace for television broadcasters, for they would — if anything — be placed in an even worse position caught between programmers and cable operators than broadcasters are now. In addition, repeal of the compulsory license would jeopardize must carry regulations. It is appropriate to expect a cable operator who controls a gateway facility to devote a portion of its cable capacity to carriage of local broadcast signals. If the cable operator would have to negotiate and pay for the programming carried on those signals, imposing a carriage obligation is obviously quite a different proposition. In particular, the fact that the rights to retransmission could be beyond even the broadcaster's control would make must carry obligations impossible to enforce. Since preventing cable operators from anticompetitive abuse of their gateway position must be a

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26/ Id. (emphasis added).